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8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA**

10 RJRN HOLDINGS LLC,

Case No.: 2:15-cv-01257-JCM-NJK

11 Plaintiff,

12 vs.

13 RHONDA DAVIS; BAC HOME LOANS
14 SERVICING, LP, FKA COUNTRYWIDE
15 HOME LOANS SERVICING, LP;
16 CARRINGTON MORTGAGE SERVICES;
17 HACIENDA NORTH HOMEOWNERS'
ASSOCIAITON; and DOES 1 through 10,
inclusive; ROE CORPORATIONS 1 through
10, inclusive,

**BAC HOME LOANS SERVICING, LP,
FKA COUNTRYWIDE HOME LOANS
SERVICING, LP AND CARRINGTON
MORTGAGE SERVICES' MOTION TO
DISMISS WITH PREJUDICE
PLAINTIFF'S COMPLAINT**

18 Defendants.

19 Defendants, BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP
20 ("BAC") and Carrington Mortgage Services ("Carrington") (collectively "Defendants"), by and
21 through its attorneys of record, Edgar C. Smith, Esq., and Victoria L. Hightower, Esq., of the law
22 firm of Wright, Finlay & Zak, LLP, hereby respectfully submit their Motion to Dismiss with
23 Prejudice Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure
24 ("FRCP").

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1 on the attached Memorandum of Points and Authorities, all papers and pleadings, all facts
2 judicially noticed, and on any oral or documentary evidence that may be presented at a hearing on
3 this matter.

4 DATED this 2nd day of September, 2015.

5
6 WRIGHT, FINLAY & ZAK, LLP

7 
8

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18
19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. INTRODUCTION**

21 Defendants seek dismissal of Plaintiff's Complaint for failure to state a claim upon which
22 relief can be granted. Plaintiff's Complaint fails to state a claim for the following reasons:

23 First, federal preemption precludes extinguishment of this FHA loan. As expressed in
24 Washington & Sandhill Homeowners Ass'n v. Bank of Am., N.A., No 2:13-cv-01845-GMN-GWF,
25 2012 WL 4798565 (D. Nev. Sept. 25, 2014), under the Property Clause and Supremacy Clause,
26 there is Federal preemption precluding extinguishment of FHA's interest upon application of the
27 State Foreclosure Statute to FHA's interest in the Property, precluding foreclosure upon and
28 extinguishment of the interest without its consent. The Property was at all relevant times and
remains now, subject to BAC's lien.

Second, the HOA Sale was not commercially reasonable. A comparison of the purchase
price with the fair market value of the Property and the unpaid balance of the loan, evidences
commercial unreasonableness as a matter of law and violates public policy.

Third, the HOA Sale violated NRS § 116.311635.

1 Fourth, Plaintiff's allegations regarding the validity of the HOA Sale are conclusory and
2 Plaintiff fails to provide any evidence that proper notice was received by BAC.

3 Fifth, the CC&Rs attest to the preservation of BAC's deed of trust after the foreclosure sale
4 by the HOA.

5 Sixth, the Nevada foreclosure statute violates BAC's due process rights under the Fifth and
6 Fourteenth Amendments.

7 Finally, BAC respectfully requests that this Court determine whether SFR can be applied
8 retroactively, rather than prospectively only.

II. STATEMENT OF FACTS

10 | *Davis Loan Documents*

11 1. On or about January 6, 2009, Rhonda M. Davis (hereinafter “Davis”) purchased the
12 real property located at 5234 Fire Night Ave., Las Vegas, Nevada 89122; APN: 161-28-316-025
13 (hereinafter “Property”).¹

14 2. The Deed of Trust executed by Davis identified Pulte Mortgage, LLC as the Lender,
15 LandAmerica as the Trustee, and Mortgage Electronic Registration Systems, Inc. (“MERS”) as
16 beneficiary acting solely as a nominee for Lender and Lender’s successors and assigns, and secured
17 a loan in the amount of \$157,528.00 (hereinafter the “Davis Loan”).²

18 3. The Davis Loan is a Federal Housing Administration (“FHA”) insured loan.

19 4. On August 11, 2010, an Assignment was recorded identifying BAC as the holder of
20 the beneficial interest under the Deed of Trust.³

21 | *The HOA Sale, Buyer's and Plaintiff's Acquisition of the Property*

22 5. On April 12, 2011, a Notice of Delinquent Assessment Lien was recorded against the
23 Property by Absolute Collection Services, LLC (hereinafter “HOA Trustee”), as agent for Hacienda
24 North Homeowners Association (hereinafter “HOA”).⁴

25 ¹ A true and correct copy of the Grant, Bargain, Sale Deed recorded in the Clark County Recorder's
26 Office as Book and Instrument Number 20090106-0000997 is attached to Defendant's RJD as **Exhibit**
27 A. All other recordings stated hereafter are recorded in the same manner.

27 ²A true and correct copy of the Deed of Trust recorded as Book and Instrument Number 20090106-0000999 on January 6, 2009, is attached to Defendant's RJD as **Exhibit B**.

28 3 A true and correct copy of the Assignment of Deed of Trust recorded as Book and Instrument
Number 20100811-0002623 is attached to Defendant's RJD as **Exhibit C**.

⁴ A true and correct copy of the Notice of Delinquent Assessment Lien recorded as Book and

1 6. On July 18, 2011, a Notice of Default and Election to Sell under Homeowners
2 Association Lien was recorded against the Property by the HOA Trustee on behalf of the HOA.⁵

3 7. On November 10, 2011, a Notice of Trustee's Sale was recorded against the Property
4 by the HOA Trustee.⁶

8. On April 18, 2012, a Trustee's Deed Upon Sale was recorded.

6 9. Upon information and belief, pursuant to the Trustee's Deed Upon Sale, a non-
7 judicial foreclosure sale occurred on April 17, 2012 (hereinafter the "HOA Sale"), whereby Rex
8 Archambault (hereinafter "Buyer") acquired its interest in the Property, if any, for \$5,000.00.⁷

9 10. On February 10, 2014, a Quitclaim Deed was recorded whereby Buyer purportedly
10 transferred his interest in the Property, if any, to Plaintiff.⁸

11 11. None of the aforementioned notices – the Notice of Lien, the Notice of Default and
12 the Notice of Sale – specified what proportion of the lien, if any, that the HOA claimed constituted a
13 “super-priority” lien.

14 12. None of the aforementioned notices identified above specified whether the HOA was
15 foreclosing on the “super-priority” portion of its lien, if any, or under the non-super-priority portion
16 of the lien.

13. None of the aforementioned notices provided any notice of a right to cure.

III. LEGAL ARGUMENTS

19 | A. **LEGAL STANDARD.**

20 FRCP Rule 12(b)(6) provides in pertinent part:

21 Every defense to a claim for relief in any pleading must be asserted in the
22 responsive pleading if one is required. But a party may assert the following
defenses by motion: ... (6) failure to state a claim upon which relief can be
granted...

Instrument Number 20110412-0001764 is attached to Defendant's RJD as Exhibit D.

25 5 A true and correct copy of the Notice of Default and Election to Sell Under Homeowners
26 Association Lien recorded as Book and Instrument Number 20110718-0000857 is attached to
Defendant's RJD as **Exhibit E**.

26 A true and correct copy of the Notice of Trustee's Sale recorded as Book and Instrument Number
27 2011111-00002405 is attached to Defendant's RJD as **Exhibit F**.

7 A true and correct copy of the Trustee's Deed Upon Sale recorded as Book and Instrument
28 Number 20120418-0001665 is attached to Defendant's RJD as Exhibit G.

⁸ A true and correct copy of the Quitclaim Deed recorded as Book and Instrument Number 20140210-0001086 is attached to Defendant's RJD as **Exhibit H**.

1 This rule mandates that a court dismiss a cause of action that fails to state a claim upon
 2 which relief can be granted. Sullivan v. Wells Fargo Bank, N.A., 3:13-CV-00055-RCJ, 2013 WL
 3 4711381, at *1 (D. Nev. Aug. 30, 2013). When considering a motion to dismiss under Rule 12(b)(6)
 4 for failure to state a claim, dismissal is appropriate only when the complaint does not give the
 5 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl.*
 6 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to
 7 state a claim, the court will take all material allegations as true and construe them in the light most
 8 favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986). The
 9 court, however, is not required to accept as true allegations that are merely conclusory, unwarranted
 10 deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d
 11 979, 988 (9th Cir.2001).

12 “Generally, a district court may not consider any material beyond the pleadings in ruling on
 13 a Rule 12(b)(6) motion. However, material which is properly submitted as part of the complaint
 14 may be considered on a motion to dismiss.” Hal Roach Studios, Inc. v. Richard Feiner & Co., 896
 15 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citation omitted). Similarly, “documents whose contents are
 16 alleged in a complaint and whose authenticity no party questions, but which are not physically
 17 attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without
 18 converting the motion to dismiss into a motion for summary judgment. Branch v. Tunnell, 14 F.3d
 19 449, 454 (9th Cir.1994). Moreover, under Federal Rule of Evidence 201, a court may take judicial
 20 notice of “matters of public record.” Mack v. S. Bay Beer Distrib., Inc., 798 F.2d 1279, 1282 (9th
 21 Cir.1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to
 22 dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp.*
 23 *Agency*, 261 F.3d 912, 925 (9th Cir.2001). Accordingly, this Court may consider the recorded
 24 documents attached to the Request for Judicial Notice filed simultaneously herewith without the
 25 Motion to Dismiss being converted into a motion for summary judgment.

26 **B. THE NEVADA HOA FORECLOSURE STATUTE IS PREEMPTED BY THE
 27 SUPREMACY CLAUSE.**

28 The Supremacy Clause prohibits Nevada law from allowing a HOA foreclosure to

1 extinguish a federally insured security interest. Washington & Sandhill Homeowners Ass'n v. Bank
 2 of Am., N.A., No 2:13-cv-01845-GMN-GWF, 2012 WL 4798565 (D. Nev. Sept. 25, 2014). Seven
 3 days after the Nevada Supreme Court ruled in SFR, Judge Navarro in Washington held that the
 4 decision in SFR does not apply to FHA loans, and that a deed of trust insured by the FHA cannot be
 5 extinguished by a Chapter 116 HOA foreclosure sale. Id.

6 HUD insures mortgages originated by private lenders – commonly known as FHA insurance
 7 – on single family residences under a federal congressional mandate to make housing available to
 8 all citizens. 12 U.S. C. § 1709. This insurance encourages private lenders, like BAC, to originate
 9 loans to individuals who would not otherwise qualify for a home loan. Secretary of Housing &
 10 Urban Dev. v. Sky Meadows Assoc., 117 F. Supp. 2d 970, 973-74 (C.D. Cal. 2000). Private
 11 lenders are induced to make essentially risk-free mortgages by being guaranteed against loss in the
 12 event of default by the borrower. Pfeifer v. Countrywide Home Loans, Inc., 211 Cal. App. 4th 1250,
 13 1265 (Cal. App., 2013). Without such insurance, private lenders would be reluctant to lend without
 14 demanding higher interest rates and substantial down payments, which many low income families
 15 cannot afford. See FNMA v. Ricks, 372 N.Y.S. 2d 485, 490 (N.Y. Sup. 1975). Thus, FHA
 16 insurance is necessary to assist with the national goal of providing decent homes for low income
 17 families. See Anderson v. U.S. Dept. of Housing & Urban Dev. 701 F.2d 112, 113-114 (10th Cir.
 18 1983).

19 Under the FHA program, the private lender may foreclose if the borrower defaults and, if the
 20 successful bidder at the foreclosure sale, the lender may convey title to the property to HUD. 24
 21 C.F.R. §§ 203.355(a); 203.359(a). The lender then submits an insurance claim for payment of its
 22 losses. 24 C.F.R. § 203.65. HUD then sells the property to help replenish the funds to sustain the
 23 FHA program. Sky Meadows, 117 F. Supp. 2d at 973-74.

24 Federal law, rather than state law, applies in cases involving FHA insured mortgages “to
 25 assure the protection of the federal program against loss, state law to the contrary notwithstanding.”
 26 United States v. Stadium Apartments, Inc., 425 F.2d 358, 362 (9th Cir. 1970). Under the
 27 Supremacy Clause, “[t]his Constitution, and the Laws of the United States, which shall be made in
 28 Pursuance thereof . . . shall be the supreme Law of the Land.” U.S. Const. Art. VI, cl. 2. The

1 Supremacy Clause overrides state law that nullifies the effectiveness of federal law. See Stadium
 2 Apartments, 425 F.2d 358, 362 (9th Cir. 1970) (applying federal law to override state law right of
 3 redemption to insure that FHA was reimbursed on its guarantee of a mortgage).

4 NRS Chapter 116 impairs or undermines federal law on FHA loans in at least two critical
 5 ways. First, it creates a nominal super-priority lien over the federally insured loan, which
 6 discourages private lenders from issuing loans to low income citizens under the FHA program out
 7 of fear the security interest would be lost before the private lender could convey the property to
 8 HUD for insurance reimbursement.

9 Second, NRS Chapter 116 encourages HOAs and even first mortgages to foreclose, while
 10 FHA or HUD regulations strongly encourage foreclosure alternatives. Until recent legislative
 11 changes in October 2013,⁹ associations had unobstructed access to foreclosure with no mediation
 12 requirement and fast and loose noticing requirements unlike the foreclosure mediation requirements
 13 and mandatory notice requirements under NRS 107. HUD regulations require at least three full
 14 monthly payments in default. See 24 C.F.R. §203.606(a). NRS 116.31162 does not have a
 15 limitation on the amount of payments that must be past due prior to initiating foreclosure. Also,
 16 HUD requests that mortgagees meet face to face with the borrower, or at least use reasonable efforts
 17 to arrange for such a meeting, prior to three full monthly payments going into default. See 24
 18 C.F.R. § 203.604(b). NRS Chapter 116 contains no such requirement. Ultimately, the HUD/FHA
 19 goal is to bring the delinquent mortgage current to avoid foreclosures to the extent possible and
 20 HUD does not expect to see foreclosure if there is a reasonable chance of saving the mortgage. See
 21 HUD Handbook Section 4330.1 at 7-1 (REV. 5).¹⁰ Meanwhile, NRS Chapter 116's goal is to
 22 expedite association foreclosures with little interaction with the homeowner/borrower outside of
 23 mailing foreclosure notices¹¹. By divesting the homeowner of title without the protections otherwise

24
 25 ⁹ Effective October 1, 2013, NRS 116.31162(6) currently prohibits association foreclosures when
 26 the unit is owner occupied, the beneficiary under a deed of trust has recorded a notice of default
 27 after October 1, 2013, and no foreclosure certificate has been recorded under NRS 107.086. Even
 this new statute encourages first mortgagees to record a notice of default to stop any association
 foreclosure sale. Still, the HOA sale in this case occurred prior to the enactment of this statute so
 the amended statute has no application to the HOA in this case.

28 ¹⁰ Available at <http://portal.hud.gov/hudportal/documents/huddoc?id=43301c7HSGH.pdf> (last
 visited March 8, 2015).

¹¹ Effective October 1, 2013, NRS 116.31162(4) currently requires the association to provide the
 homeowner/borrower with a proposed repayment plan and a notice of right to contest the past due

1 envisioned by HUD as it relates to FHA-insured mortgage loans, the association's actions were in
 2 direct opposition to the public policy articulated by HUD throughout the entirety of the mortgage
 3 foreclosure crises. These actions rendered moot any attempt by the loan servicer to comply with
 4 HUD's loss mitigation requirements that seek to keep the homeowner in the home.

5 Therefore, as ruled in the Washington & Sandhill case, foreclosures under NRS Chapter 116
 6 operates to impede the implementation of federal policies and programs and must yield under the
 7 Supremacy Clause of the Constitution to the interests of the federal government. No 2:13-cv-
 8 01845-GMN-GWF, 2012 WL 4798565 at 6, citing Rust v. Johnson, 597 F.2d 174, 179 (9th Cir.
 9 1979). Therefore, Plaintiff's Motion for Summary should be denied and Defendants'
 10 Countermotion should be granted because the Davis Loan is an FHA Loan.

11 **C. FHA INSURANCE EXISTS TO PROMOTE HOMEOWNERSHIP FOR LOWER-
 12 INCOME BORROWERS AND FORECLOSURE AVOIDANCE IS AN ESSENTIAL
 13 PART OF THAT PROGRAM.**

14 The FHA's mission is as broad as it is essential: "the Federal Government expands
 15 homeownership 'opportunities for first time homebuyers and other borrowers who would not
 16 otherwise qualify for conventional mortgages on affordable terms, as well as for those who live in
 17 underserved areas where mortgages may be harder to get."¹² "[FHA] is the largest insurer of
 18 mortgages in the world, insuring over 34 million properties since its inception in 1934."¹³ "FHA
 19 provides a huge economic stimulation to the country in the form of home and community
 20 development, which trickles down to local communities in the form of jobs, building suppliers, tax
 21 bases, schools, and other forms of revenue."¹⁴ "Section 203(b) is the centerpiece of FHA's single
 22 family mortgage insurance programs, the successor of the program that helped save homeowners
 23 from default in the 1930s, that helped open the suburbs for returning veterans in the 1940s and
 24 1950s, and that helped shape the modern mortgage finance system."¹⁵ *See also Saticoy Bay LLC,*

25 obligation at a hearing. However, and again, the HOA sale in this case occurred prior to the
 26 enactment of this statute so it has no application in this case.

27 ¹² Mortgage Insurance for One to Four Family Homes Section 203(b), HUD.gov,
 28 http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/s:th/ins/203 b--df (last visited
 Jan. 5, 2015).

27 ¹³ The Federal Housing Administration (FHA), HUD.gov,
 28 http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/fhahistory (last visited Jan. 5,
 2015).

28 ¹⁴ *Id.*

29 ¹⁵ Mortgage Insurance for One to Four Family Homes Section 203(b), HUD.gov,

1 Series 7342 Tanglewood Park, Case no. 2:13-cv-01199-JCM-VCF, Order, at 5-6 (“Allowing an
 2 HOA foreclosure to wipe out a first deed of trust on a federally-insured property thus interferes with
 3 the purposes of the FHA insurance program. Specifically, it hinders HUD’s ability to recoup funds
 4 from insured properties.”).

5 Courts recognize that administration of FHA insurance involves “economic and managerial
 6 decisions” about which “courts are ill-equipped to superintend,” Hahn v. Gottlieb, 430 F.2d 1243,
 7 1249-51 (1st Cir. 1970). Day-to-day decisions concerning, for instance, whether and when to
 8 foreclose or forbear from foreclosing “involve[] a balancing of factors and a consideration of
 9 complex financial data.” Falzarano v. United States, 607 F.2d 506, 512 (1st Cir. 1979). Under the
 10 FHA Programs at issue, the federal government insures certain residential mortgage loans originated
 11 by private lenders for at-risk borrowers who qualify for assistance under FHA criteria. See, e.g., 12
 12 U.S.C. § 1701t (“[T]here should be the fullest practicable utilization of the resources and
 13 capabilities of private enterprise and of individual self-help techniques.”).¹⁶ These loans are issued
 14 to borrowers who might otherwise not qualify for conventional mortgages due, for example, to their
 15 inability to make more than a minimal down payment or their having significantly lower credit
 16 scores than banks would otherwise approve.¹⁷

17 FHA is not analogous to a private insurer. As a federal agency, “FHA insures mortgages so
 18 that lenders will be encouraged to make more mortgages available for people.”¹⁸ And HUD, which
 19 oversees FHA, has a significant interest in promoting and ensuring housing for all, including low

20 http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/ins/203_b--df (last visited
 21 Jan. 5, 2015).

22 ¹⁶ See also Housing Act of 1949, § 2, 42 U.S.C. § 1441 (policy of Housing Act of 1949 is to
 23 encourage private enterprise “to serve as large a part of the total need as it can”); Department of
 24 Housing and Urban Development Act of 1965, §§ 2, 3(a), 42 U.S.C. §§ 3531 (HUD to “encourage
 25 the maximum contributions that may be made by vigorous private home-building and mortgage
 26 lending institutions to housing, urban development, and the national economy”), 3532(b) (Secretary
 27 of HUD to do the same).

28 ¹⁷ See *supra* note X and accompanying text; Mortgage Credit Analysis for Mortgage Insurance on
 29 One- to Four-Unit Mortgage Loans (4155.1), ch. 4, § 2.A.2.a, available at
 30 http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4155.1/4155_IHSGH.pdf (last visited
 31 Jan. 5, 2015) (“In order for FHA to insure this maximum loan amount, the borrower must make a
 32 required investment of at least 3.5% of the lesser of the appraised value or the sales price of the
 33 property.”). *Id.* § 4.A.1.c (showing that borrowers with credit scores between 500 and 579 are
 34 eligible for a maximum Loan-To-Value ratio of 90%).

35 ¹⁸ Discontinuing Monthly Mortgage Insurance Premium Payments, HUD.gov,
 36 http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/comp/premiums/prem2001
 37 (last visited Jan. 5, 2015).

1 income families.¹⁹ This strong federal interest encompasses keeping borrowers in their homes for
 2 some period of time during default as lender and borrower try to resolve the delinquency.²⁰ Thus, in
 3 managing the FHA Programs, HUD has enacted a comprehensive set of servicing guidelines that are
 4 aimed at keeping at-risk borrowers in their homes to the extent possible, including in circumstances
 5 where the borrowers are in financial distress. For example, before claiming a default and initiating
 6 foreclosure proceedings, the FHA Programs' regulations require that mortgagees consider
 7 forbearance and pre-foreclosure counseling²¹-which can take six months or more²²-and provide that
 8 noncompliance may result in a civil monetary penalty and withdrawal of HUD's approval of the
 9 mortgagee as a program participant, 24 C.F.R. § 203.500. In addition to forbearance,²³ FHA
 10 regulations require that mortgagees consider or attempt other forms of relief short of foreclosure,
 11 including modifications to the terms of the loan to make the loan more affordable, *Id.* §§ 203.357,
 12 203.370, 203.608, 203.616. Moreover, even where foreclosure is inevitable, FHA regulations
 13 identify a lengthy and exhaustive process that details the level and form of borrower
 14 communications required before foreclosure may begin.²⁴ In sum, federal regulators have
 15

16 ¹⁹ See HUD's Mission Statement, available at
 17 <http://portal.hud.gov/hudportal/HUD?src=/about/mission> (last visited, Jan. 5, 2015) ("HUD's
 18 mission is to create strong, sustainable, inclusive communities and quality affordable homes for
 19 all.").

20 ²⁰ See HUD Mortgagee Letter 2010-04, at 1 (Jan. 22, 2010),
 21 http://portal.hud.gov/hudportal/documents/huddoc?id=10-04_ml.pdf (last visited Jan. 5,
 22 2015) ("Loss
 23 Mitigation is critical to both borrowers and FHA because it works to fulfill the goal of helping
 24 borrowers retain homeownership while protecting the FHA Insurance Fund from unnecessary
 25 losses.").

26 ²¹ See 24 C.F.R. § 203.501 (requiring that mortgagees "must consider" actions such as "special
 27 forbearance," meaning in cases where the mortgagor does not own other FHA-insured property and
 28 the default was caused by circumstances beyond the mortgagor's control, the forbearance agreement
 29 will not require increased payments before the original maturity date of the mortgage); HUD
 30 Administration of Insured Home Mortgages Handbook 4330.1, ch. 7, § 7-3, available at
 31 <http://portal.hud.gov/hudportal/documents/huddoc?id=43301c7HSGH.pdf> (last visited Jan. 5, 2015)
 32 (requiring that servicers "make a concerted effort to help the mortgagor resolve his/her financial
 33 problems," specifically addressing that a mortgage servicer should endeavor to be aware of marital
 34 difficulties, substance abuse, excessive gambling, loss of income, loss of employment, illness, and
 35 other factors, and then refer borrowers to counseling before initiating foreclosure).

36 ²² HUD Administration of Insured Home Mortgages Handbook 4330.1 app. 18, at 2, available at
 37 <http://portal.hud.gov/hudpmial/documents/huddoc?id=43301x18HSGH.pdf> (last visited Jan. 5,
 38 2015).

39 ²³ See 24 C.F.R. §§ 203.471, 203.614.

40 ²⁴ See generally HUD Administration of Insured Home Mortgages Handbook 4330.1, ch. 7, § 7-7,
 41 available at <http://portal.hud.gov/hudportal/documents/huddoc?id=43301c7HSGH.pdf> (last visited
 42 Jan. 5, 2015).

1 marshalled many decades of expertise to enact a comprehensive and detailed approach to
 2 foreclosure and foreclosure forbearance on FHA-insured mortgages, the goal of which is to expand
 3 the housing market for those who would otherwise not be able to purchase a home.

4 **D. NRS 116.3116 IS PREEMPTED BECAUSE IT FRUSTRATES FHA'S
 5 FORECLOSURE-AVOIDANCE EFFORTS.**

6 By allowing HOAs to foreclose on distressed borrowers, Nevada law conflicts with FHA
 7 regulations specifying foreclosure as a "last resort" for this potentially vulnerable category of
 8 borrowers.²⁵ As Chief Judge Navarro found in Washington, "a homeowner[] association's
 9 foreclosure under Nevada Revised Statutes § 116.3116 on a Property with a mortgage insured under
 10 the FHA insurance program would have the effect of limiting the effectiveness of the remedies
 11 available to the United States," and, thus, "the Supremacy Clause bars such foreclosure sales." 2014
 12 WL 4798565, at *7. After all, whereas the policy of federal law as administered by HUD is to keep
 13 borrowers in their homes as long as possible-as evidenced by the numerous guidelines and
 14 regulations that require servicers to explore alternatives to foreclosure²⁶-Nevada Revised Statute §
 15 116.3116 obstructs that policy by permitting HOAs to foreclose (and dispossess the homeowners)
 16 even while the mortgagees are working with the borrowers as required by HUD's guidelines.
 17 Further, Nevada Revised Statute§ 116.3116 interferes with the insurance component that is the
 18 centerpiece of the FHA Programs and HUD's interest in obtaining title to FHA-insured properties
 19 upon default. " The purpose of the [Single Family Property Disposition (SFPD)] Program" is to
 20 reduce the inventory of acquired properties "in a manner that expands home ownership
 21 opportunities, strengthens neighborhoods and communities, and ensures a maximum return to the
 22 mortgage insurance fund." 24 C.F.R. § 291.1. To achieve these goals, HUD exercises discretion to
 23 pay claims and take title to insured properties after default, even if the mortgagee has not complied

24
 25 ²⁵ HUD Administration of Insured Home Mortgages Handbook 4330.1, ch. 9, § 9-3, *available at*
<http://portal.hud.gov/hudportal/documents/huddoc?id=43301c9HSGH.pdf>(last visited Jan. 5, 2015)
 26 ("Foreclosure should be considered only as a last resort and shall not be initiated until all other
 relief options have been exhausted.").

27 ²⁶ See, e.g., HUD Administration of Insured Home Mortgages Handbook 4330.1, ch. 7, § 7-1,
 28 available at <http://portal.hud.gov/hudportal/documents/huddoc?id=43301c7HSGH.pdf>(last visited
 Jan. 5, 2015) ("HUD does not expect to see a delinquent mortgage foreclosed if there is a
 reasonable chance of saving the mortgage."); 24 C.F.R. § 203.501 (requiring mortgagees to consider
 alternatives to foreclosure such as special forbearance and mortgage modifications).

1 with all regulatory requirements or paid off all HOA claims.²⁷ As Chief Judge Navarro held, “state
 2 laws cannot operate to undermine the federal agency’s ability to obtain title after foreclosure and
 3 resell the propert[ies].” Washington, 2014 WL 4798565, at *6.

4 Indeed, even Nevada has recognized that HOA foreclosures interfere with mortgagees’
 5 efforts to keep borrowers in their homes and has made some-albeit insufficient-effort to mitigate the
 6 controversial rush to foreclose by HOAs and their collection agents. In 2013, Nevada changed its
 7 law to bar HOAs from initiating non-judicial foreclosure proceedings after the mortgagee has
 8 recorded a notice of default and before it complies with Nevada’s own foreclosure avoidance
 9 procedures (which generally require pre-foreclosure mediation). *See* NRS § 116.31162(6)(b).

10 Although this amendment reflects the Nevada Legislature’s own recognition of the harm
 11 caused by HOA foreclosures, the amendment is not sweeping enough to avoid federal preemption as
 12 applied to FHA-insured loans because Nevada law still frustrates federal foreclosure forbearance
 13 objectives. As the Supreme Court has recognized, a “[c]onflict in technique can be fully as
 14 disruptive to the system Congress enacted as conflict in overt policy.” Amalgamated Ass’n of
 15 Street, Electric Ry., & Motor Coach Emps. v. Lockridge, 403 U.S. 274, 287 (1971). For example,
 16 under the 2013 amendment, nothing impedes the HOA from pursuing foreclosure and removing the
 17 borrower from the home where the mortgagee has not issued a notice of default; indeed, if anything,
 18 Nevada law works directly at cross purposes with federal law by encouraging mortgagees to issue a
 19 notice of default and initiate foreclosure at the earliest possible time in order to at least temporarily
 20 prevent the HOA from proceeding with its own foreclosure. In contrast, the FHA Programs direct
 21 mortgagees on insured loans to work with the borrower and to evaluate modification and other
 22 alternatives before taking steps toward foreclosure. The U.S. Supreme Court and other federal
 23 courts have found preemption of state law under the Supremacy Clause in much less compelling
 24 circumstances than those presented here. For instance, in De la Cuesta, the Supreme Court held that
 25

26 ²⁷ For instance, 24 C.F.R. § 203.363 provides that HUD, in its discretion, may grant extra time to a
 27 lender to cure any regulatory non-compliance, and 24 C.F.R. § 203.402(k), HUD may curtail the
 28 insurance pay-out, but need not entirely decline to pay at all, due to the failure to meet a number of
 regulatory requirements. See also HUD Administration of Insured Home Mortgages Handbook
 4330.1, ch. 7, § 7-12(D), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=43301c7HSGH.pdf> (last visited Dec. 29, 2014); HUD Mortgagee Letter 2013-38, at 2 (Oct. 28, 2013),
<http://portal.hud.gov/hudportal/documents/huddoc?id=13-3 8ml.pdf>.

1 a Federal Home Loan Bank Board regulation permitting-but not requiring-federal savings and loan
 2 associations to include “due-on-sale” clauses in their mortgage contracts preempted state law that
 3 restricted the use of such clauses.” By further limiting the availability of an option the Board
 4 considers essential to the economic soundness of the thrift industry, the State has created ‘an
 5 obstacle to the accomplishment and execution of the full purposes and objectives’ of the due-on-
 6 sale regulation.” 458 U.S. at 156 (citations omitted).

7 Here, HUD explicitly directs servicers to exercise restraint in proceeding with foreclosures
 8 to help keep borrowers in their homes. Since, Nevada Revised Statute § 116.3116 impermissibly
 9 restricts the discretion of both the servicer and HUD in addressing borrower default, it is preempted
 10 under the Supremacy Clause as applied to FHA insured mortgages.²⁸ Finally, the preemptive effect
 11 here is modest. Nothing about HUD regulations or federal preemption requires HOAs to give up
 12 their partial priority of payment, NRS 116.3116(2); they simply require that HOAs yield to the
 13 FHA-insured mortgagee with respect to the timing of their recovery out of foreclosure proceeds,
 14 NRS 116.31162. The HOAs will still receive the fees that are entitled to super-priority status
 15 following a sale conducted by the mortgagee. But allowing an HOA to foreclose on an FHA-insured
 16 loan plainly frustrates the objectives of HUD regulations in restricting foreclosures on at-risk FHA
 17 borrowers where specified foreclosure avoidance measures offer some promise in keeping the
 18 borrowers in their homes. SFR fails to address the impact of Nevada Revised Statute § 116.3116 on
 19 the FHA Programs, or Chief Judge Navarro’s Order in Washington. BAC does not allege that HUD
 20 took title to the Property, or that it could today. BAC simply alleges that HUD’s insurance of a
 21 mortgage under the FHA insurance program creates a federal property interest. BAC nowhere
 22 alleges that HUD today holds title to the Property; indeed BAC seeks “an order quieting title and
 23 establishing that its deed of trust is the senior lien encumbering the property.” It does not by this

24
 25 ²⁸ Similarly, in Forest Park II v. Hadley, 336 F.3d 724 (8th Cir. 2003), a state statute required
 26 owners of federally subsidized low-income housing to comply with prepayment requirements and
 27 schedules that differed from those imposed under federal law and HUD regulations. The Court in
Forest Park II noted it was possible to comply with both laws. At issue were conflicting notice
 28 requirements and “Forest Park could give 365 days notice to the state and 250 days notice to HUD.”
Id. at 732. But by requiring more notice under state law, the private entity would be required to
 wait longer than it otherwise would have before it could prepay its loans. While the Eighth Circuit
 recognized that compliance with both statutes was possible, it reasoned that such an argument did
 “not address the principal problem with these state statutes-they fly in the face of the Constitution’s
 Supremacy Clause.” Id.

1 action seek conveyance to HUD.

2 BAC's Supremacy Clause argument does not depend on HUD presently owning the
 3 Property. Similarly, in finding Nevada Revised Statute § 116.3116 preempted under the Supremacy
 4 Clause to the extent it allows an HOA to foreclose ahead of an FHA-insured mortgagee, Chief
 5 Judge Navarro did not rely on the existence of a vested federal property interest. While the federal
 6 court considered whether the Property Clause of the U.S. Constitution applied, it saw no reason to
 7 "make such a finding" in that case given that the mortgage interest was only "insured by HUD at the
 8 time of the foreclosure"-i. e., the court explicitly recognized that HUD was neither the mortgagee
 9 nor the title-holder. Washington, 2014 WL 4798565, at *6. Rather, the court held that
 10 "extinguish[ment] [of] a first secured interest" of a mortgagee where the mortgage is insured by
 11 HUD "would 'operate[] to impede or condition the implementation of federal policies and
 12 programs' and therefore 'must yield under the supremacy clause of the Constitution to the interests
 13 of the federal government.'" Id. (quoting Rust v. Johnson, 597 F.2d 174, 179 (9th Cir. 1979)).²⁹
 14 Because neither the Supremacy Clause nor Washington relies on the existence of a vested federal
 15 property interest, Washington applies here and preempts the HOA's attempt to foreclose on the
 16 FHA-insured property at issue ahead of BAC.

17 **E. THE HOA'S LIEN VIOLATED NRS § 116.3116.**

18 Under NRS Chapter 116 and the Nevada Real Estate Division's ("NRED") Advisory
 19 Opinion 13-01, a lien under NRS 116.3116(1) can only include costs and fees that are specifically
 20 enumerated in the statute. NRS Chapter 116 specifically excludes attorney's fees and the costs of
 21 collection from being included in an HOA Lien. The language in NRS 116.3102(1) lists five
 22 categories of penalties, fees, charges, late charges, fines, and interest that an HOA can include in the
 23 association's lien. The costs of collecting and attorney's fees are not listed in any of the five
 24 categories under NRS 116.3102(1). The HOA Notices show that the HOA included collection costs
 25 into the HOA Lien.³⁰ The inclusion of attorney's fees and collection costs in the association's lien
 26

27 ²⁹ See also Saticoy Bay LLC, Series 7342 Tanglewood Park, Case no. 2:13-cv-01199-JCM-VCF,
 28 Order, at 5-6 ("[P]recedent forbids application of a state law that impedes a federal interest. Because
 the evidence supports a finding that the property was federally insured at the time of the HOA
 foreclosure sale, the court concludes that the HOA foreclosure sale at issue was invalid.").

³⁰ See Exhibits D, E and F.

1 violates NRS Chapter 116; therefore, a question of fact exists as to whether the HOA Lien is
 2 statutorily improper and whether the HOA Sale must be found invalid.

3 Several Judges in the Eighth Judicial District Court of Clark County, Nevada have issued
 4 opinions consistent with the above interpretation of NRS Chapter 116. The Court in Stanford Burt
 5 v. Sutter Creek Homeowners Association, et al., Case No. A-12-672790-C, Court Minutes, stated
 6 that an HOA Lien was statutorily improper and the foreclosure sale by the HOA should be rescinded
 7 because the HOA Lien included the costs of collection.³¹ The Court in Wingbrook Capital, LLC v.
 8 Peppertree Homeowners Association, Case No. A-11-636948-B, Order, confirms that an
 9 association's lien does not include any fees, cost of collection, or additional costs outside the scope
 10 of NRS Chapter 116. Wingbrook concluded,

11 [T]he **Super Priority Lien amount is not without limits** and NRS 116.3116
 12 provides that the amount of the Super Priority Lien (i.e. the amount of a
 13 homeowners' associations' Statutory Lien which retains priority status over the
 14 First Security Interest) is limited "to the extent" of those assessments for common
 15 expenses based upon the associations' periodic budget that would have become
 16 due in the nine (9) month period immediately preceding an associations'
 17 institution of an action to enforce its Statutory Lien and "to the extent" of
 18 external repaid costs pursuant to NRS 116.310312.³²

19 Therefore after the foreclosure by a First Security Interest holder of a unit located
 20 within a homeowners' association, pursuant to NRS 116.3116 the monetary limit
 21 of a homeowners' association's Super Priority Lien is limited to a maximum
 22 amount equaling nine (9) times the homeowners' association's monthly
 23 assessment amount to unit owners for common expenses based on the periodic
 24 budget which would have become due immediately preceding the institution of
 25 an action to enforce the lien plus external repair costs pursuant to NRS
 26 116.310312.³³

27 Therefore, the Court in Wingbrook and Burt reaffirm the Nevada Real Estate Opinion and statutory
 28 language in NRS Chapter 116, wherein the HOA Lien cannot include attorney's fees or collection
 29 costs.

30 The NRED Opinion 13-01 has also stated that attorney's fees and the costs of collecting on
 31 an HOA Lien cannot be included in the lien. In August of 2012, the Nevada Supreme Court
 32 recognized that the Nevada Real Estate Division of the Department of Business and Industry is
 33 responsible for interpreting NRS Chapter 116 and issuing advisory opinions relating to the extent

³¹ See Stanford Burt v. Sutter Creek Homeowners Association, et al., Case No. A-12-672790-C, Court Minutes, is attached to Defendant's RJD as Exhibit I.

³² Id.

³³ Id.

1 and priority of the association super-priority lien. See State, Bus. & Indus. v. Nev. Ass'n Servs.,
 2 128 Nev. Adv. Op. 34, 294 P.3d 1223, 1227 (2012) (“We therefore determine that the plain language
 3 of the statutes requires that the CCICCH and the Real Estate Division, and no other commission or
 4 division, interpret NRS Chapter 116.”). The Nevada Supreme Court has also stated that courts
 5 generally give “great deference” to an agency’s interpretation of a statute that the agency is charged
 6 with enforcing. State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 116 Nev. 290, 293 (2000); see
 7 also Dutchess Business Services v. Nev. State Bd. Of Pharmacy, 124 Nev. 701, 709 (2008) (stating
 8 that it “defer[s] to an agency’s interpretation of its governing statutes or regulations if the
 9 interpretation is within the language of the statute.”). In December 12, 2012, NRED issued its
 10 Advisory Opinion 13-01 directly on point.³⁴ The Opinion was asked three questions that dealt with
 11 the enforcement of an HOA Lien. The Opinion strongly stated that the association’s lien cannot
 12 include the costs of collection as defined in NRS 116.310313. The Opinion cites to the
 13 Commission for Common Interest Communities and Condominium Hotels Advisory Opinion No.
 14 2010-01 to support the assertion that the cost of collecting is not included in the association’s lien.
 15 The Advisory Opinion No. 2010-01 states, “An association may collect as a part of the super
 16 priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the
 17 declaration, (c) charges for preparing any statements of unpaid assessments and (d) the “costs of
 18 collecting” authorized by NRS 116.310313.”

19 The NRED Opinion clearly states that the “Costs of collecting” defined by NRS 116.310313
 20 is too broad to fall within the parameters of charges for late payment of assessments.³⁵ By
 21 definition, the “costs of collecting” relate to the collection of past due “obligations,” which are in
 22 turn defined as “any assessment, fine, construction penalty, fee, charge or interest levied or imposed
 23 against a unit’s owner.”³⁶ Since the instant HOA Notices include the cost of collection in the HOA
 24 Lien, the HOA Lien and subsequent sale are invalid and in direct violation of NRS Chapter 116.
 25 Based on the above, the plain language of NRS 116.3116(1) and the statutory interpretation of the
 26 NRED Opinion, the costs of collecting cannot be included in an association’s lien.

27
 28 ³⁴ See Nevada Real Estate Opinion 13-01 attached hereto as **Exhibit J**.

³⁵ Charges for late payment of assessments come from NRS 116.3102(1)(k) and are incorporated
 into NRS § 116.3116(1).

³⁶ NRS § 116.310313.

1 Accordingly, Plaintiff's Complaint must be dismissed as HOA's lien failed to comply with
 2 NRS 116 et seq. and NRED.

3 **F. THE FAILURE OF NRS CHAPTER 116 TO REQUIRE ACTUAL NOTICE TO
 4 LENDERS VIOLATES CONSTITUTIONAL DUE PROCESS RIGHTS AND
 5 RENDERS THE STATUTES FACIALLY VOID AND UNENFORCEABLE.³⁷**

6 The fatal flaw of NRS Chapter 116 – which SFR did not address – is that none of its express
 7 notice provisions provide for mandatory notice to lenders³⁸; despite the fact that their property rights
 8 are directly threatened by an HOA's non-judicial foreclosure. Instead of mandating notice to
 9 lenders, the statutes provide various “opt-in” provisions that would allow “any person with an
 10 interest” to request notice in advance of a foreclosure sale by submitting a written notice request to
 11 the HOA. Thus, under the statutes, the affirmative duty is on the lender to request notice, not on the
 12 HOA to provide notice. This is true even when the lender has a prior recorded interest. Such facially
 13 defective notice requirements establish the constitutional infirmity of NRS § 116.3116 and
 14 necessitate setting aside the HOA sale and dismissing the case as a matter of law in favor of BAC.

15 **1. BAC's Facial Challenge Is a Legal Issue of First Impression Which This
 16 Court Can Consider despite the SFR decision.**

17 The distinction must be drawn between facial versus as-applied challenges. An as-applied
 18 challenge asks a court to hold that a statute is unconstitutional under the specific facts of a case. See
 19 Ezell v. City of Chicago, 651 F.3d 684, 698-99 (7th Cir. 2011). Conversely, a facial challenge asks
 20 a court to hold that a statute is void because the alleged violation is intrinsic to the statutes' terms,
 21 not its application. 651 F.3d at 698-99 (holding that the City Council violated the Second
 22 Amendment *when* it created a gun law mandating firing-range training)., Black's Law Dictionary
 23 (9th ed. 2009) makes the distinction between the respective challenges thusly: an as-applied
 24 challenge is “a claim that a statute is unconstitutional on the facts of a particular case or in its
 25 application to a particular party” while a facial challenge is “a claim that a statute is unconstitutional
 26 on its face - that is, that it always operates unconstitutionally.” See also Seguin v. City of Sterling
 27 Heights, 968 F.2d 584, 589-90 (6th Cir. 1992) (in a due process challenge holding that plaintiffs'

28 ³⁷ Pursuant to NRS 30.130, JPMorgan will serve notice of its constitutional challenge of NRS § 116.3116 to the Nevada Attorney General's Office forthwith.

38 BAC uses “lender” to include the original lender, or a subsequent investor, servicer, or beneficiary of the deed of trust at issue.

1 injury occurred *when* the city council passed the zoning ordinance at issue). Importantly, “individual
 2 application of facts do not matter” in a facial challenge and “the plaintiff’s personal situation
 3 becomes irrelevant.” Ezell, 651 F.3d at 697 (citing Reno v. Flores, 507 U.S. 292 (1993)); see also
 4 John Doe No. I v. Reed, 561 U.S. 186 (2010). Accordingly, facial challenges attack the terms of a
 5 statute and as-applied challenges attack its execution – that is, was a facially sound law applied in
 6 an unconstitutional manner to a particular plaintiff. As a consequence, if a statute is
 7 unconstitutional as applied, the State may continue to enforce the statute in different circumstances
 8 where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not
 9 enforce the statute under any circumstances. Women’s Med. Prof. Corp. v. Voinovich, 130 F.3d
 10 187, 193 (6th Cir. 1997). This distinction underscores the point that SFR addressed the as-applied
 11 challenge and not a facial challenge since that plaintiff should have survived the motion to dismiss
 12 since its complaint alleged that the statutorily required notices were given, not whether the
 13 statutorily required notices were insufficient as a matter of law to protect the lender’s due process
 14 rights.³⁹ Indeed, the Nevada Supreme Court never addressed whether notice was or was not
 15 constitutionally required. This distinction also demonstrates that it would not matter to a facial
 16 challenge if, in an individual case, the lender had *actual* notice but the statutes permit the taking
 17 without requiring notice. This Court need only evaluate whether the terms of the statutes
 18 themselves violate a constitutional right. This is a purely legal issue appropriate for determination
 19 even at the motion to dismiss stage. Ezell, 651 F.3d at 697. For the reasons set forth below, NRS
 20 Chapter 116 is unconstitutional because its “opt-in” notice provisions do not comply with the due
 21 process requirements.

22 **2. Due Process Requires that Lienholders Receive Notice Prior to Foreclosure of
 23 Real Property.**

24 The due process provisions of the United States Constitution require that “at a minimum,
 25 [the] deprivation of life, liberty or property by adjudication be preceded by notice and opportunity
 26 for hearing appropriate to the nature of the case.” Mullane v. Central Hanover Bank & Trust Co.,
 27

28 ³⁹ There, U.S. Bank made an as-applied – not facial – challenge to the HOA’s compliance with the
 29 notice provisions of the statutes, arguing that “the content of the notice it received” was not specific
 enough to satisfy statutory requirements. 334 P.3d at 418.

1 339 U.S. 306, 314 (1950).⁴⁰ The United States Supreme Court has established the well-settled rule
 2 that state action affecting real property must be accompanied by notice of the action. “An
 3 elementary and fundamental requirement of due process … is notice reasonably calculated, under all
 4 circumstances, to apprise interested parties of the pendency of the action and afford them an
 5 opportunity to present their objections.” Tulsa Prof. Collection Services, Inc. v. Pope, 485 U.S. 478,
 6 484 (1988). The Court made this point particularly clear in Mennonite Bd. of Missions v. Adams,
 7 holding that any party with an interest in real property subject to deprivation must receive actual
 8 notice of the event that causes the deprivation. 465 U.S. 791 (1983). Moreover, “[n]otice by mail or
 9 other means as certain to ensure actual notice is a minimum constitutional precondition to a
 10 proceeding which will adversely affect the liberty or property interests of any party, whether
 11 unlettered or well versed in commercial practice.” Mennonite, 462 U.S. at 798. While diligence may
 12 differ depending on the context, Mennonite requires that reasonable steps be taken to provide actual
 13 notice to interested parties. 462 U.S. at 795-800.

14 **a. Statutory “opt in” notice provisions do not satisfy Federal due process
 15 requirements.**

16 “Opt-in” notice provisions have repeatedly been held to violate Constitutional due process
 17 requirements. In the years following the Mullane and Mennonite decisions, several states attempted
 18 to circumvent notice requirements when real property was at issue. Among the most popular was
 19 the use of an “opt in” provision – meaning that a state’s foreclosure statute would require no notice
 20 to interested parties unless that interested party affirmatively requested such notice, as is the case
 21 here. For example, in Small Engine Shop, Inc. v. Cascio, 878 F.2d 883, 893 (5th Cir. 1989), the
 22 Fifth Circuit analyzed Louisiana’s “opt in” clause and concluded it did not satisfy due process
 23 requirements because it did not mandate notice to all interested parties. Instead, just like NRS

24 ⁴⁰ The Nevada Supreme Court has “consistently relied upon the [United States] Supreme Court’s
 25 holdings interpreting the federal Due Process Clause to define the fundamental liberties protected
 26 under Nevada’s due process clause.” State v. Eighth Jud Dist. Ct. (Logan D.), 306 P.3d 369, 377
 27 (2013); Hernandez v. Bennett-Haron, 287 P.3d 305, 310 (2012) (holding that “the similarities
 28 between the due process clauses contained in the United States and Nevada Constitutions, permit us
 to look to federal precedent for guidance as we determine whether the procedures utilized … are
 consistent with the due process clause set forth in the Article 1, Section 8(5) of the Nevada
 Constitution.”) (citing Rodriguez v. Dist. Ct., 120 Nev. 798, 808 n. 22, 102 P.3d 41, 48 n. 22 (2004)
 (“[t]he language in Article I, Section 8(5) of the Nevada Constitution mirrors the Due Process
 Clauses of the Fifth and Fourteenth Amendments to the United States Constitution”)).

1 Chapter 116, it required an individual or entity to affirmatively request notice. *Id.* at 885-86. This
 2 “burden-shifting” was at the center of the controversy. The court applied Mennonite and Mullane
 3 and held that the statute failed Mennonite’s allocation of notice burdens. *Id.* at 890. Thus, where a
 4 statute’s sole notice provision is a burden-shifting “opt-in” provision, like NRS Chapter 116, the
 5 statute is unconstitutional because it does not meet Federal due process requirements.

6 **b. Nevada’s “opt in” Statute does not satisfy the minimum notice requirements
 7 mandated by the Supreme Court, rendering the statutes void and
 unenforceable.**

8 NRS Chapter 116 does not include any express or mandatory notice provision requiring
 9 notice to the lender. This is the primary constitutional defect. While the statutes expressly address
 10 notice requirements in four separate provisions, none of them mandate actual notice to the lender.
 11 Instead, each requires the lender to “opt in” and affirmatively request notice, as detailed below.

12 NRS § 116.31162 governs the mailing of notice of delinquent assessments but only to “the
 13 unit’s owner or his or her successor in interest.” It does not require that an HOA provide any notice
 14 to the lender of the delinquent assessment, in violation of due process requirements.

15 NRS § 116.31163 governs the mailing of the notice of default and election to sell but only to
 16 “Each person who has requested notice pursuant to NRS §§ 107.090 or 116.31168; [and] Any
 17 holder of a recorded security interest encumbering the unit’s owner’s interest who has notified the
 18 association, 30 days before the recordation of the notice of default, of the existence of the security
 19 interest.” This express notice provision does not require mandatory notice to the lender, again in
 20 violation of basic due process requirements, and each subsection instead governs how to “opt in”
 21 and request notice. Reference therein to NRS §§ 107.090 and 116.31168 does not save this
 22 provision, as both govern a request for notice (and further fail as detailed below).

23 NRS § 116.31165, governs mailing the notice of sale, but again only to:

24 Each person entitled to receive a copy of the notice of default and election to sell
 25 notice under NRS 116.31163; [and] The holder of a recorded security interest or
 26 the purchaser of the unit, if either of them has notified the association, before the
 mailing of the notice of sale, of the existence of the security interest, lease or
 contract of sale, as applicable.

27 This third notice provision does not mandate affirmative, actual notice to the lender, again in
 28 violation of due process.

1 NRS § 116.31168, “Foreclosure of liens: Requests by interested persons for notice of default
 2 and election to sell...,” also unconstitutionally shifts the burden to lenders, requiring they “opt in” to
 3 receive notice of foreclosure as under NRS § 107.090 “as if a deed of trust were being foreclosed”
 4 with a *request* that “must identify the lien by stating the names of the unit’s owner and the common-
 5 interest community.” Moreover, NRS § 116.31168 only applies to a notice of default and election
 6 to sell and does not apply to any other form of notice –specifically, the notice of trustee’s sale.

7 The reference in NRS § 116.31168 to NRS § 107.090(3) (notice of default) and (4) (notice
 8 of sale) does not save the statute since these sections cannot apply to lenders for purposes of notice
 9 because their interest is not “*subordinate* to the deed of trust” (emphasis added) – their interest *is*
 10 the deed of trust. This inconsistency makes it unlikely that any HOA or its foreclosure trustee would
 11 understand they must give notice to the holder of that first deed of trust. As the dissent in SFR
 12 acknowledged, “The means employed must be such as one desirous of actually informing the
 13 absentee might reasonably adopt to accomplish it.” 334 P.3d at 422 (citing Mullane, 339 U.S. at
 14 315. NRS § 116.31162-116.31168 fail this requirement.

15 The Nevada Legislature knows how to draft an express notice requirement- it has done so in
 16 many places throughout the statutes. But as to lenders, NRS Chapter 116’s notice provisions are
 17 constitutionally flawed, rendering the statutes invalid on their face. Accordingly, Plaintiff cannot
 18 prevail on any of its claims against BAC since its claim to title is founded on a statutory scheme that
 19 is facially unconstitutional. Accordingly, Plaintiff’s claims should be dismissed with prejudice.

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IV. CONCLUSION

Based on the above, Defendants respectfully request the Court grant its Motion to Dismiss with Prejudice Plaintiff's Complaint.

DATED this 2nd day of September, 2015.

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CERTIFICATE OF MAILING

2 I HEREBY CERTIFY that I am an employee of WRIGHT, FINLAY & ZAK, LLP; that
3 service of the foregoing **BAC HOME LOANS SERVICING, LP, FKA COUNTRYWIDE**
4 **HOME LOANS SERVICING, LP AND CARRINGTON MORTGAGE SERVICES'**
5 **MOTION TO DISMISS WITH PREJUDICE PLAINTIFF'S COMPLAINT** was made on the
6 2 day of September, 2015, by electronic means or depositing a copy of same in the United States
7 Mail, at Las Vegas, Nevada, addressed as follows:

Michael Beede, Esq.
The Law Office of Mike Beede, PLLC
2300 W. Sahara Ave. #420
Las Vegas, NV 89102
Attorney for Plaintiff

An Employee of WRIGHT, FINLAY & ZAK, LLP